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NO. 79-1906

In The
Supreme Court of the United States

October Term, 1979

MAYOR AND CITY COUNCIL OF BALTIMORE
Petitioner

v.

WARREN O. BARGER AND MARION IWANCIO,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. In actions brought under both the Jones Act and General Maritime Law, were the District Court's instructions, and the Jury's awards of non-pecuniary damages, to two seamen who were injured due to the uncontested negligence

of the shipowner and unseaworthiness of its vessels, in accordance with firmly established law?

2. Was the Court of Appeals correct in ruling that the District Court's erroneous instruction concerning negligence per se was harmless error, and did this ruling create a conflict in the circuits?

3. Did the Petitioner waive its right to assert an alleged error in the lower court's instructions to the Jury in regard to the measure of damages and negligence per se, due to its failure to object to those instructions?

4. Should Respondents be awarded attorneys' fees because of the totally frivolous nature of the Petition and the consequent unjust delay in the recovery rightfully due them?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW....	1
STATEMENT OF THE CASE.....	8
REASONS FOR DENYING THE PETITION..	14
I. IN ACTIONS BROUGHT UNDER BOTH THE JONES ACT AND GENERAL MARITIME LAW, THE DISTRICT COURT'S INSTRUCTIONS AND THE JURY'S AWARDS OF NON-PECUNIARY DAMAGES TO SEAMEN WHO WERE INJURED AS A RESULT OF THE UNCONTESTED NEGLIGENCE OF PETITIONER AND THE UNSEAWORTHINESS OF ITS VESSELS, WERE PROPER AND CONSISTENT WITH FIRMLY ESTABLISHED LAW.....	14
II. THE COURT OF APPEALS WAS CORRECT IN RULING THAT THE DISTRICT COURT'S ERRONEOUS INSTRUCTION CONCERNING NEGLIGENCE PER SE WAS HARMLESS ERROR, AND DID NOT CREATE A CONFLICT IN THE CIRCUITS.....	23
III. THE CITY WAIVED ITS RIGHT TO ASSERT AN ALLEGED ERROR IN THE LOWER COURT'S INSTRUCTIONS TO THE JURY IN REGARD TO THE MEASURE OF DAMAGES AND NEGLIGENCE PER SE INSTRUCTION.....	25

IV. RESPONDENTS SHOULD BE AWARDED ATTORNEYS FEES BECAUSE OF THE TOTALLY FRIVOLOUS NATURE OF THE CITY'S PETITION..... 28

CONCLUSION..... 30

APPENDIX..... 31

TABLE OF AUTHORITIES

Cases

Page

Barger v. Mayor and City Council of Baltimore, 616 F.2d 730 (4th Cir. 1980)..... 13, 24, 25, 26

Blanco v. Phoenix Compania De Navegacion, S.A., 304 F.2d 13 (4th Cir. 1962)..... 20

Bullard v. Central Vermont Railway, Inc., 565 F.2d 193 (1st Cir. 1977) 19

Chesapeake and Ohio Railway Company v. Carnahan, 241 U.S. 241 (1916).. 19

Clary v. Ocean Drilling and Exploration Company, 429 F.Supp. 905 (W.D. La. 1977), aff'd, 609 F.2d 1120 (5th Cir. 1980)..... 25

Dagnello v. Long Island Rail Road Company, 289 F.2d 797 (2nd Cir. 1961) 19

Downie v. United States Lines Co., 359 F.2d 344 (3rd Cir.), cert. denied, 385 U.S. 897 (1966)..... 20, 21

Emaldio v. Pocahontas Steamship Company, 355 F.2d 55 (4th Cir. 1966)..... 28

Hayes v. New York Central Railroad Co., 311 F.2d 198 (2nd Cir. 1962). 19

Honea v. West Virginia Pulp and Paper Company, 380 F.2d 704 (4th Cir. 1967)..... 27

Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir.), cert. denied, 352 U.S. 941 (1966)..... 20

Ivy v. Security Barge Lines, Inc., 606 F.2d 524 (5th Cir. 1979), U.S. appeal pending..... 18

Layton v. Selb Manufacturing Company, 359 F.2d 715 (8th Cir.) cert. denied 385 U.S. 929 (1966), rehearing denied 385 U.S. 1021 (1967)..... 28-29

Michigan Central Railroad Co. v. Vreeland, 227 U.S. 59 (1913)..... 17, 18

In Re Midland United Co., 141 F.2d 692 (3rd Cir. 1944)..... 29

Mileski v. Long Island Rail Road Company, 499 F.2d 1169 (2nd Cir. 1974)..... 19

Mobil Oil Corporation v. Higginbotham, 436 U.S. 618 (1978)..... 15

Moragne v. States Marine Lines, 398 U.S. 375 (1970)..... 15, 16, 22

National Marine Service, Inc. v. Gulf Oil Company, 433 F.Supp. 913 (E.D. La. 1977), aff'd, 608 F.2d 522 (5th Cir. 1979)..... 25

Oliver v. Seaboard Air Line Railway, 250 F. 652 (S.D. Ga. 1918), rev'd on other grounds, 261 F. 1 (5th Cir. 1919)..... 18, 19

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 rehearing denied 415 U.S. 986 (1974)..... 15

Stevens v. Seacoast Company, Inc., 414 F.2d 1032 (5th Cir. 1969)..... 20

Whitney v. Cook, 99 U.S. 607 (1879)..... 28

Wright v. Central National Bank, 37 F.2d 234 (10th Cir. 1929), cert. denied 281 U.S. 755 (1930)..... 29

Statutes, Rules, Regulations

Statutes

Federal Employers' Liability Act, 45 U.S.C. §51, et seq (1976)..... 17, 18, 19

The Jones Act, 46 U.S.C. §688... 8, 18, 19, 22

Death on the High Seas Act, 46 U.S.C. §761 (1976)..... 23

Occupational Safety and Health Act, 29 U.S.C. §651, et seq.. 23

28 U.S.C. §1912..... 16, 28

Rules

Rule 17, Supreme Court Rules (1980)..... 21, 27
Rule 49, Supreme Court Rules (1980)..... 16, 29
Rule 28(a)(4), Federal Rules of Appellate Procedure..... 15, 29
Rule 51, Federal Rules of Civil Procedure..... 15, 24, 25-26, 27, 29

Regulations

Occupational Safety & Health Act Regulations, 29 C.F.R. Chapter XVIII..... 23, 25, 26

Treatises

1B Benedict on Admiralty (7th Ed. 1979)..... 20

STATEMENT OF THE CASE

The Respondents (the seamen) in this case, Warren O. Barger (Barger) and Marion Iwancio (Iwancio), were employed by Petitioner, the City of Baltimore (hereinafter referred to as the "City") as marine engineers in the Marine Division of the Baltimore City Fire Department (A. 68, 139). Both Barger and Iwancio worked as members of the crew of various fireboats owned, operated and controlled by the City (A. 139, 186) and sustained permanent hearing losses due to their exposure to extraordinarily high noise levels in the engine rooms of the City's vessels. The City stipulated and in fact admitted that Barger and Iwancio were seamen and entitled to all remedies applicable to seamen under federal law (A. 259,* Appellant's Brief on Appeal, p. 7).

Suit was instituted by the seamen against the City for recovery of damages under the provisions of the Jones Act (46 U.S.C. Sec. 688) and the general maritime law of seaworthiness. A jury trial was held before the Honorable Herbert F. Murray, United States District Judge.

As members of the crew of the City's fireboats, Barger and Iwancio were ordered and required to work in the

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* References are to the pages of the printed Joint Appendix filed with the Court of Appeals.

engine rooms of its vessels for over 20 years (A. 137, T. 187-190). Initially, and prior to 1956, the City owned steam powered fireboats. In 1956 and later in 1960 it purchased several diesel powered fireboats (A. 139, T. 263). The noise levels generated in the engine rooms of these diesel powered boats were tremendously loud and Barger and Iwancio were continuously exposed to the noise levels in these vessels for over 15 years (A. 140). From the first day these vessels were introduced into service, crew members of these vessels complained about the nature and extent of the engine room noise levels. (A. 140). The complaints were not only oral (T. 264-267),* but were written and included union grievances (T. 266, T. 59-61, Pl. Ex. 1). The complaints about the noise levels continued for 15 years before any action was taken to lessen the effect of the noise on engine room personnel (T. 64, T. 267-270, T. 357).

Despite the complaints about the noise levels the City failed to test the engine room noise levels to determine if the noise levels were hazardous or dangerous (T. 405-406), or to test any engine room personnel to determine if they were suffering impaired hearing (A. 406). The City also failed either to institute any hearing conservation program, or to determine if any engineering improvements could be made to lessen the noise level, or the effect upon the engineers who were exposed to the noise levels (T. 266-269).

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* "T" refers to pages in the Transcript of Proceedings before the District Court.

In April, 1971, the City, for the first time, provided two sets of noise suppressors to the engine room of its vessels (T. 196). The City did not require its engineers to wear the noise suppressors, and did not promulgate or enforce any rules or regulations for the wearing of same (T. 197). Even after introducing the noise suppressors, the City failed to test the noise levels in the engine rooms, failed to test the engine room personnel to determine if they sustained any hearing loss, and did not institute any hearing conservation program (T. 196-198).

Prior to trial the seamen retained the services of an expert in the field of noise exposure and noise control to conduct tests and measure the noise levels created by the engine room machinery of the City's fireboats. This expert testified to the significance of these noise levels, which were dangerously high and likely to cause serious and permanent hearing loss unless proper precautions were taken (A. 346, 347, 172-180). The expert testimony further revealed that the decibel noise levels exceeded OSHA acceptable decibel noise level limits for employees subjected to excessive noise levels without using proper noise suppression devices. (A. 179-180). The expert further stated that where noise levels were excessive it was the industry-wide practice and custom to test the environment, evaluate the employee's hearing and institute a hearing conservation program (A. 178-180, 183-184). Moreover, the expert explained that where decibel noise levels were excessive, it

was the accepted industry-wide practice to employ the use of noise suppression devices. (A. 182-184). The City called two (2) witnesses on this issue. Both witnesses testified, that the engine rooms of the City's fireboats were generating dangerously high noise levels which were causing hearing losses to engine room personnel (Pl. Ex. 21, Def. Ex. 2).

The seamen further produced uncontradicted medical testimony that as a result of their exposure to the noise levels on the fireboats they had sustained bilateral neurosensory hearing losses (A. 106-107, 113-114, 243). The medical testimony further revealed that Barger's and Iwancio's hearing loss was of a permanent nature and could not be corrected by any operative procedure (A. 107-108, 115, 243-244). Further, the expert testimony revealed a significant danger of aggravating and/or exascerbating their hearing losses if they were to return to duty in the engine room and be exposed to those noise levels or similar noise levels (A. 109, 115, 245). Significantly, the City introduced no medical testimony to contradict or impeach these findings.

In addition to the presentation of evidence by the seamen's expert as to the economic loss each of them sustained, evidence was introduced as to the non-pecuniary elements of damages sustained by them. The mental anguish, the suffering, the embarrassment and humiliation of having sustained a significant degree of hearing loss, (A. 84-88, T. 367-372),

the effect that such loss had on social, recreational and familial activities (A. 226-231, 232-238), and the likelihood of such damage continuing into the future were all factors presented to the Jury without objection.

The trial judge, with the agreement of counsel, submitted five alternative theories of liability under the Jones Act and three theories under the general admiralty law of seaworthiness to the jury (A. 313). Included in this charge, was the instruction that violation of the OSHA standards constituted negligence per se under the Jones Act and rendered the vessels in question unseaworthy (A. 313). The City did not object to this instruction, and in fact, the Fourth Circuit found that the City expressly agreed to the District Judge's proposed instructions before he presented them to the Jury (Petitioner's Brief, p. 5a). The court further instructed the jury that it may consider the seamen's physical pain, mental suffering, discomfort, embarrassment, anguish, humiliation, and the diminution in their capacity to enjoy life for the past and future in addition to pecuniary loss (A. 319). The City also failed to object to this instruction in the district court or in its brief on appeal to the Fourth Circuit.

The jury rendered a verdict in favor of Barger and against the City in the amount of $153,000 and in favor of Iwancio and against the City in the amount of $112,500, on special issues, finding the City negligent and its vessels unseaworthy. The Court denied

the City's Motion for Judgment N.O.V. and/or for a new trial. The City filed an appeal with the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals ruled that the OSHA regulations do not apply to Jones Act seamen, and therefore, the jury instruction that a violation of an OSHA regulation constituted negligence per se was erroneously given. 616 F.2d 730, 733. The Court, nevertheless, concluded that, based on the particular facts involved in this case and the expert testimony adduced at trial, said erroneous instruction constituted harmless error, and thus, refused to reverse the jury verdict and did not remand the case for a new trial. 616 F.2d at 733-34. The Fourth Circuit also concluded that the verdicts were not excessive and that the District Judge did not abuse his discretion in refusing to reduce the damage awards. 616 F.2d at 734. Finally, the City's argument that non-pecuniary damages were not properly recoverable in a Jones Act personal injury case, which was asserted for the first time in oral argument before the Court of Appeals, was found by the Fourth Circuit to be "totally inapposite." 616 F.2d at 734, n. 7.

The City has petitioned this Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

REASONS FOR DENYING THE PETITION

I.

IN ACTIONS BROUGHT UNDER BOTH THE JONES ACT AND GENERAL MARITIME LAW, THE DISTRICT COURT'S INSTRUCTIONS AND THE JURY'S AWARDS OF NON-PECUNIARY DAMAGES TO SEAMEN WHO WERE INJURED AS A RESULT OF THE UNCONTESTED NEGLIGENCE OF PETITIONER AND THE UNSEAWORTHINESS OF ITS VESSELS, WERE PROPER AND CONSISTENT WITH FIRMLY ESTABLISTED LAW.

At trial, the Honorable Herbert F. Murray, Judge of the United States District Court for the District of Maryland, properly instructed the jury that it could consider non-pecuniary, in addition to pecuniary elements of damages in determining a reasonable award to Respondents. In describing "non-pecuniary" elements of damages, Judge Murray instructed the Jury:

> "You are to consider the physical pain and mental suffering and the discomfort which they have endured in the past by reason of these injuries. You are to consider the physical pain and mental discomfort to which they may be subjected in the future. You are to consider the embarrassment, anguish and humiliation to which the plaintiffs have been subjected and may be subjected in the future as a result of any hearing loss. You are to consider the extent to which the plaintiffs' capacity

> for enjoyment of life has been damaged and is likely to be damaged in the future.
>
> After consideration of all of these elements of damage, you should award such sum of money as will adequately, fairly and fully compensate the plaintiffs for all of their injuries, losses, and damages." (A. 319).

The City never objected to this instruction. The jury, finding the City negligent and its vessels unseaworthy, awarded Iwancio $112,500 in damages; Barger was awarded $153,000 in damages.

Despite the City's failure both to object to this charge at the time it was presented to the jury, and to raise this issue in its brief to the Fourth Circuit,[1] it now asserts that Judge Murray's instruction was improper. Respondent contends that the City has clearly waived any right to assert error in the instruction. Rule 51, F.R.C.P., Rule 28(a)(4), F.R.A.P.

The City contends that this case presents a novel question for review because a triad of admiralty cases decided by this Court during the past decade,[2] which are allegedly in conflict

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[1] The first time the City raised this issue concerning the appropriateness of Judge Murray's instruction on the recovery of non-pecuniary damages was in oral argument before the Court of Appeals.

[2] Moragne v. States Marine Lines, 398 U.S. 375 (1970) (hereinafter referred to as "Moragne"); Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 rehearing denied 415 U.S. 986 (1974) (hereinafter referred to as "Gaudet"); Mobil Oil Corporation

with the established principles of recoverable damages in Jones Act cases. A review and analysis of the relevant case law in this area, however, clearly reveals that the City's argument in this respect is completely invalid, incorrect and frivolous. It further indicates a total failure on the part of the City to properly read and understand the Jones Act and general maritime law, and cases decided thereunder for over fifty (50) years which have permitted the recovery of the very same elements of damage awarded by the Jury in this case. This is elementary and universally understood and accepted maritime law. It is for this reason that Respondents are asking this Court to impose the sanctions of fees and costs on the City as authorized by 28 U.S.C. Sec. 1912 and Rule 49, U.S. Supreme Court Rules.

First, each and every case cited by the City, including the Moragne-Gaudet-Mobil Oil triad, involves an action for the death of a seaman or longshoreman. The instant case, in contrast, is not a death action brought by the survivors of a decedent seaman. Rather, it is an action initiated by the injured seamen themselves, seeking pecuniary and non-pecuniary damages for personal injuries sustained during the course of their employment. As the discussion below will reveal, the courts have consistently treated damage claims in personal injury cases differently than such claims in death cases, permitting recovery for non-pecuniary losses in the former, but denying such recovery in the latter, except for conscious pain and suffering.

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[2] (cont'd.) v. Higginbotham, 436 U.S. 618 (1978) (hereinafter referred to as "Mobil Oil") and sometimes hereinafter referred to as the Moragne-Gaudet-Mobil Oil triad.

The Jones Act, by its express terms, incorporates the Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C. §51, et seq, and provides the following:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply...." 46 U.S.C. §688

Thus, in determining the propriety of particular elements of damages in both seaman death cases and personal injury cases, courts must first scrutinize the developed and established body of law regarding such damages under the F.E.L.A.

(a) Death Cases.

Beginning with this Court's decision in Michigan Central Railroad Co. v. Vreeland, 227 U.S. 59 (1913), (hereinafter referred to as "Vreeland") death cases under F.E.L.A. have limited recovery by survivors of the decedent railway employee to damages that "flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries". 227 U.S. at 70. Losses which result from the deprivation of society and companionship are excluded, as well as recovery by the

survivors for the decedent's pain and suffering, prior to his death. Nevertheless, the courts have consistently held that the decedent, prior to his death, may maintain his own action under the F.E.L.A. for pain and suffering and other non-pecuniary damages. Vreeland, 227 U.S. at 66. See also Oliver v. Seaboard Air Line Railway, 250 F. 652 (S.D.Ga. 1918), rev'd on other grounds 261 F. 1 (5th Cir. 1919).

This principle of limiting recovery in F.E.L.A. death cases to pecuniary loss "has uniformly been adopted with respect to Jones Act death actions." Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 526 (5th Cir. 1979) U.S. appeal pending, (emphasis added) (hereinafter referred to as "Ivy"). The Ivy decision, in footnotes 4 and 5 thereof, provides an exhaustive list of death cases under both F.E.L.A. and the Jones Act, respectively, where recovery has been limited to pecuniary loss. 606 F.2d at 526. The City, in failing to recognize and understand the different damage principles applied by the courts in F.E.L.A. and Jones Act death actions as opposed to personal injury actions, relies on the Ivy decision and the cases cited in footnote 5 thereof for the proposition that pecuniary losses are the sole remedy available in any and all Jones Act cases. However, as the clearly established law discussed below reveals, the City's contention is totally wrong and the advancement of such a proposition in this Court overlooks a whole body of law and is frivolous.

(b) Personal Injury Cases

This Court, as well as the lower federal and state courts, has held that a railway employee, injured during the course of his employment, is entitled to recover "non-pecuniary" damages as early as in Chesapeake & Ohio Railway Company v. Carnahan, 241 U.S. 241 (1916) (hereinafter referred to as "Carnahan"). In Carnahan, a trial court's charge instructing the jury that it "may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future" in assessing damages in a F.E.L.A. personal injury action was affirmed by this Court. 241 U.S. at 243 (emphasis added). Similarly, recovery has been permitted for the following "non-pecuniary" damages under the F.E.L.A.: pain and suffering, See Mileski v. Long Island Rail Road Company, 499 F.2d 1169 (2nd Cir. 1974); Dagnello v. Long Island Rail Road Company, 289 F.2d 797 (2nd Cir. 1961); Oliver v. Seaboard Air Line Railway, 250 F.652 (S.D.Ga. 1918), rev'd on other grounds,261 F. 1 (5th Cir. 1919); mental distress, fright, anguish and humiliation, See Bullard v. Central Vermont Railway, Inc., 565 F.2d 193 (1st Cir. 1977); Hayes v. New York Central Railroad Co., 311 F.2d 198 (2nd Cir. 1962).

In accordance with the provisions set forth above, the courts have applied this principle of awarding "non-pecuniary" damages under the F.E.L.A., to actions under the Jones Act in cases involving personal injuries.

Therefore, it has become well settled and firmly established law that an injured seaman may recover "non-pecuniary" damages, in addition to pecuniary damages, in both Jones Act and general maritime causes of action. The circuits have uniformly adhered to this principle. Stevens v. Seacoast Company, Inc., 414 F.2d 1032 (5th Cir. 1969); Downie v. United States Lines Co., 359 F.2d 344 (3rd Cir.), cert. denied, 385 U.S. 897 (1966); Blanco v. Phoenix Compania De Navegacion, S.A., 304 F.2d 13 (4th Cir. 1962); Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir.), cert. denied, 352 U.S. 941 (1956).

In defining the scope of "non-pecuniary" damages in admiralty actions the courts have held that it encompasses the following: (1) physical pain and suffering, See Imperial Oil, Ltd. v. Drlik, 234 F.2d at 10-11 (6th Cir. 1956); (2) mental anguish, humiliation and embarrassment, See Blanco v. Phoenix Compania De Navegacion, S.A., 304 F.2d at 16 (4th Cir. 1962); (3) loss of pleasure and ability to engage in those activities which contribute to the normal enjoyment of life, See Downie v. United States Lines Co., 359 F.2d at 347-348 (3rd Cir. 1966) where the Court explained that examples of elements that enter into an award of damages under this rule include "inability to dance, bowl, swim or engage in similar recreational activities; inability to perform customary household chores; and inability to engage in the usual family activities." 359 F.2d at 347 n.3. Moreover, such "non-pecuniary" damages may be awarded for past (commencing with the time of the injury), and future physical and mental effects of the

injury, based on life expectancy at the time of the injury. Downie v. United States Lines Co., 359 F.2d at 347.

Judge Murray's instruction in this case carefully and clearly set forth each of the non-pecuniary elements of damages which, as explained above, the courts have held to be appropriate for jury consideration - past and future physical pain, mental suffering, anguish, embarrassment, humiliation and the extent to which the capacity for enjoyment of life has been damaged. The court did not go beyond these well established principles and did not instruct the jury to consider any other non-pecuniary damages. Furthermore, the elements of properly recoverable damages contained in the trial court's charge in this matter, are almost identical to those elements of damages listed in the sample jury instructions, supplied by the Honorable Alvin B. Rubin, then Judge of the United States District Court for the Eastern District of Louisiana,[3] to Benedict on Admiralty, the established treatise in maritime law. See 1B Benedict on Admiralty §32, Form 32-1 (7th Ed. 1979). (Appendix A)

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[3] Now Associate Judge of the United States Court of Appeals for the Fifth Circuit.

(c) No Uncertainty or Conflict Exists Among the Circuits.

Rule 17 of the Supreme Court Rules provides that:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor....
>
> "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last record; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

The City, in urging this Court to issue a writ, wrongly states that the Moragne-Gaudet-Mobil Oil triad has caused confusion and uncertainty regarding the appropriateness of non-pecuniary damages in Jones Act cases, and, consequently, has created a conflict among the circuits. This contention is without merit for two reasons. First, the Moragne-Gaudet-Mobil Oil triad concerns the applicability of damages in death cases under general

maritime law, the Death on the High Seas Act, 46 U.S.C. §761 (DOHSA), and the Jones Act. As explained above, the instant dispute involved a personal injury claim, not a death claim, and the courts have continually treated these actions differently. Accordingly, the applicability of those cases is totally irrelevant to the case at bar. Second, the triad decisions are consistent with each other, and the City has failed to establish that a conflict among the circuits exists.

Respondents respectfully submit that the City's argument and contention that "...the law relative to this issue is conflicting and uncertain" (Petition p. 9), is entirely unintelligible, completely disregards fifty years of existing precedent and is totally frivolous.

II.

THE COURT OF APPEALS WAS CORRECT IN RULING THAT THE DISTRICT COURT'S ERRONEOUS INSTRUCTION CONCERNING NEGLIGENCE PER SE WAS HARMLESS ERROR, AND DID NOT CREATE A CONFLICT IN THE CIRCUITS.

In the charge concerning both the Jones Act and general maritime law, the District Court instructed the jury that the City had been subject to the regulations of the Occupational Safety & Health Act, 29 U.S.C. §651 et seq. (OSHA), 29 CFR Chapter XVIII, since 1971, and that if the City failed to comply with OSHA noise regulations in the operation of its fireboats, it would be guilty of negli-

gence per se. (A. 309-310) The City failed to object to this instruction during the trial of this case and the Fourth Circuit found that the City had expressly agreed to the District Judge's proposed instructions before he presented them to the Jury (A. 284).

Although the literal terms of Federal Rules of Civil Procedure 51 would prevent the City from raising this objection on appeal, the Court considered whether justice would be disserved by allowing the verdicts to remain undisturbed. Concluding that: (1) the OSHA regulations were largely a restatement of industry practice regarding employee exposure to noise, and therefore embodied a standard of care which might be applied to the City even in the absence of the regulations; (2) that the district court's instruction applied the regulation only during the period beginning in 1971, a small fraction of the time that the seamen worked on the fireboats; and (3) because both seamen sought medical treatment for their loss of hearing soon after 1971, indicating that their loss of hearing has been caused by noise exposure that took place over a long period prior to 1971, the Fourth Circuit held that the district court's charge to the jury amounted to harmless error, and the failure to correct said error would not result in a miscarriage of justice. 616 F.2d 734. This conclusion was proper and in accordance with established law.

The City contends that the Fourth Circuit decision in this case created a conflict in Circuits. This assertion is not supported by any case which demonstrates such a conflict.

The Fourth Circuit, consistent with the Fifth Circuit in National Marine Service, Inc. v. Gulf Oil Company, 433 F.Supp. 913 (E.D. La. 1977) aff'd, 608 F.2d 522 (5th Cir. 1979) and Clary v. Ocean Drilling and Exploration Company, 429 F.Supp. 905 (W.D.La. 1977) aff'd, 609 F.2d 1120 (5th Cir. 1980), concluded that OSHA regulations are inapplicable to the working conditions of seamen. The Fourth Circuit concluded in this case that the error was harmless based upon the particular facts of this case as noted above, 616 F.2d at 733-34. No conflict within the circuits has been shown to exist, and it is irresponsible for the City to contend that there is any such conflict.

Accordingly, since the Fourth Circuit properly interpreted and consistently applied the relevant law, no writ of certiorari should be issued in this matter since no conflict in circuits has been demonstrated.

III.

THE CITY WAIVED ITS RIGHT TO ASSERT AN ALLEGED ERROR IN THE LOWER COURT'S INSTRUCTIONS TO THE JURY IN REGARD TO THE MEASURE OF DAMAGES AND NEGLIGENCE PER SE INSTRUCTION.

Rule 51 of the Federal Rules of Civil Procedure provides, in part:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the

jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

As explained above, the City failed to object to both the instructions regarding the measure of damages and as to the applicability of the OSHA regulations. Moreover, the Fourth Circuit found that the City agreed with the instructions. 616 F.2d 733. As mandated by Rule 51, the City has waived its right to object to these instructions and the City's Petition must be dismissed.

The District Court followed the recommended practice of reviewing on the record with counsel for both sides, the proposed instructions (A. 256-287). During said conference, the City failed to object to the instruction regarding non-pecuniary damages and, in fact, noted its agreement with all of the instructions relating to damages (A. 270-271). At trial, neither an objection nor an exception was made with regard to said instruction. The City's brief filed with the Fourth Circuit, failed to raise this contention, and contained no argument that the non-pecuniary damage instruction was erroneous. In fact, the first time the City ever asserted this issue, was in its oral argument before the Fourth Circuit. 616 F.2d 734, n. 7.

Moreover, at the conference with the trial judge on the proposed jury instructions, Barger and Iwancio requested the court to instruct the jury that violation of the OSHA regulation dealing with

noise exposure would be negligence per se and would amount to unseaworthiness if the jury believed it was a proximate cause of the seamen's hearing loss (A. 275-277). At the conclusion of this "on the record" discussion the court indicated that it would consider such request and decide the question before the jury was brought in the next day (A. 281). The court did reconsider its instructions and granted the seamen's requested instruction (A. 282-287). When asked by the court if that instruction would be satisfactory with both sides, counsel for the City said "It is with the defense, Your Honor". (A. 284). The court then asked for any further exceptions as to the OSHA instructions (A. 285) to which the City made no reply. Again, at the conclusion of the entire thirty (30) page instruction to the jury, the court asked counsel if there were any exceptions to the charge and the City made only one exception to the charge which was unrelated to the OSHA instruction, and failed to except to the charge as it related to the OSHA instruction (A. 327-328).

As noted by the Fourth Circuit in Honea v. West Virginia Pulp and Paper Company, 380 F.2d 704, 708 (4th Cir. 1967), "The very purpose of the rule [Rule 51] is to give the trial judge the opportunity to correct any error brought to his attention before the case is submitted to the jury for decision." Therefore, Rule 51 and Supreme Court Rule 17 mandate that a Writ of Certiorari should not issue where the party requesting said writ has been dilatory in asserting its objections and preserving the record for judicial review.

IV.

RESPONDENTS SHOULD BE AWARDED ATTORNEYS FEES BECAUSE OF THE TOTALLY FRIVOLOUS NATURE OF THE CITY'S PETITION.

28 U.S.C. §1912 provides:

> "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

Under this section, courts are granted the authority to impose sanctions against parties who prosecute frivolous appeals. Emaldio v. Pocahontas Steamship Company, 355 F.2d 55 (4th Cir. 1966).

In Whitney v. Cook, 99 U.S. 607 (1879) this Court stated the following:

> "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages....[P]arties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked." 99 U.S. at 607.

See, e.g. Layton v. Selb Manufacturing Company, 359 F.2d 715, 717 (8th Cir.), and cases cited in note 6, cert. denied,

385 U.S. 929 (1966), rehearing denied 385 U.S. 1021 (1967); In Re Midland United Co., 141 F.2d 692 (3rd Cir. 1944); Wright v. Central National Bank, 37 F.2d 234, cert. denied, 281 U.S. 755 for examples of cases where the courts have awarded damages, including attorneys fees and other costs, for frivolous appeals. Furthermore, new U.S. Supreme Court Rules provide for the award of appropriate damages for frivolous Petitions for Writ of Certiorari. See Rule 49.2.

As each of the arguments presented above indicate, the case law pertaining to the issue raised by the City in its Petition is clear, well established and not open to dispute or confusion. The main thrust of the City's Petition ignores over fifty years of precedent and this alone justifies the imposition of damages. Moreover, the City has failed to properly preserve any of the alleged errors it now asserts by not properly adhering to the provisions of Rule 51 of the F.R.C.P. and Rule 28(a)(4) of the F.R.A.P. Finally, there is absolutely no demonstrated conflict or confusion among the circuits with regard to any of the issues that the City has requested this Court to review.

Barger and Iwancio however, having been unjustly injured by the delay, should be awarded damages, including attorneys fees and costs.

CONCLUSION

For all of the aforegoing reasons Respondents respectfully request that the Petition be denied, and that this Court award Respondents damages, including attorneys fees and costs.

Respectfully submitted,

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§ 32. Damages.[1]

FORM No. 32–1

Damages: Elements, Nature and Extent of Liability[2]

If you find that the defendant is liable in this case, you should assess as damages the amount you find justified by a preponderance of the evidence as full and just compensation for all of the plaintiff's damages, no more and no less. Damages are not allowed as a punishment against a party, and cannot be imposed or increased to penalize the defendant. Neither can damages be based on speculation for it is only actual damages—what the law calls compensatory damages—that are recoverable. On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury, tangible and intangible. They are an attempt to restore the plaintiff; that is, to make him whole or as he was immediately prior to his injury.

You should consider the following elements of damages to the extent you find them proved by a preponderance of the evidence, and no others: (1) physical pain and suffering including physical disability, impairment and inconvenience, and the effect of plaintiff's injuries upon the normal pursuits and pleasures of life; (2) mental anguish and anxiety including humiliation, shame and embarrassment, worry and concern, and feelings of economic insecurity caused by disability; (3) income loss in the past; (4) impairment of earning capacity or ability in the future, including impairment of normal progress in the plaintiff's earning capacity.

No evidence of the value of such intangible things as mental or physical pain and suffering has been nor need be introduced: for, in that respect, it is not value you are trying

[1] A substantive treatment of damages is reserved for a future release. For a discussion of damages in death cases see 2 *Benedict* § 86.

[2] Form adapted from charges supplied by Judge Alvin B. Rubin of the Eastern District of Louisiana.

to determine, but an amount that will fairly compensate the plaintiff for the damages he has suffered.

You are not to award damages for any injury or condition from which the plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence in the case that such injury or condition was proximately caused by the accident in question.

In arriving at an amount of your verdict, you should also take into consideration the fact that all persons do not live to their age of life expectancy, and that their earnings may not remain stationary, but may vary, increase, diminish, or cease in the future from causes or infirmities in no way involved with the issues in this case.